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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1659

WILLIAM P. PATRICK,
Petitioner,

vs.

FIELD RESEARCH CORPORATION,
MERVIN D. FIELD,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District, Division One

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The petitioner, William P. Patrick, defendant in this First Amendment libel action, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District, Division One ("Court of Appeal"), entered in this proceeding on February 16, 1973.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeal is reported in *Field Research Corp. v. Patrick,* 30 Cal.App.3d 603, 106 Cal. Rptr. 473 (1973) and is reproduced as Appendix A.

The order of the Court of Appeal refusing petitioner's request for a rehearing, dated and entered on March 16, 1973, is reproduced as Appendix B.

The order of the California Supreme Court refusing petitioner's request for a hearing, dated and entered on April 12, 1973, is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeal was entered on February 16, 1973. A timely petition for rehearing was denied by the Court of Appeal on March 16, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Whether, in a First Amendment libel case, an appellate finding of error of constitutional proportions in the trial court's burden of proof instructions on actual malice requires reversal of a plaintiffs' judgment based thereon?

Whether, in a First Amendment libel case, it is permissible for an appellate court, by assuming the jury function, to deny a defendant his right to a jury trial under constitutionally proper instructions?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is the First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This case arises from statements made in the heat of a vigorous political campaign for the office of Governor of California. Each of the litigants voluntarily thrust himself into the public arena. Petitioner was a candidate in the 1966 Republican gubernatorial primary. Respondents published the California Poll of February 15, 1966. That poll indicated that, of the candidates in the Republican primary campaign, Ronald Reagan was favored by 38% of the voters, George Christopher by 35% of the voters, petitioner by 1% of the voters, and 22% of the electorate were undecided. R.T. 903:24-904:10.

Subsequent to the publication of this poll, petitioner made statements concerning its results, the substance of which was (1) that he believed, based on reports from a reliable source, that the poll of February 15 had been paid for by candidate Christopher or Christopher forces for $16,000 and thus reflected good things for Christopher; (2) that the poll was timed to go along with then Senator Thomas Kuchel's endorsement of Christopher; (3) that the poll was corrupt and dishonest; (4) that petitioner was stronger than the poll indicated; (5) that petitioner was prepared to go to court to back up his statements; (6) that the poll was designed to tie in with a deal between candidate Reagan and Christopher (of which petitioner had previous knowledge) whereby the weaker candidate, according to the polls, would support the stronger; and (7) that the poll was designed to get Reagan, petitioner, and everyone else out of the race. C.T. 109:10-115:4; 303:5-307:23.

On the basis of these statements, respondents filed this First Amendment libel action.

Respondents conceded that they were public figures. R.T. 1662:17-26. Moreover, there is no dispute that respondents had the burden of proving petitioner made the subject

statements with actual malice—that is, with knowing falsity or reckless disregard for truth. R.T. 1662:10-26, 1784:22-1785:5.

However, in giving the actual malice instructions, the trial court rejected petitioner's proposed instructions that respondents had to prove actual malice by clear and convincing evidence. C.T. 59:11-16; 64:5-22; 73:1-23; 74:21-75:5. Under California law, the court's refusal to give petitioner's proffered instructions is automatically deemed excepted to. California Code of Civil Procedure, § 647. In place of the rejected clear and convincing evidence instructions, the court instructed the jury that respondents were required to prove their case by a preponderance of the evidence. R.T. 1798:22-24. The court defined a preponderance of the evidence as "such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein." R.T. 1798:25-28. After instructing the jury that respondents had to prove actual malice since they were public figures and the integrity of the California Poll was a matter of public interest, the court reiterated that respondents only had to prove actual malice by a preponderance of the evidence. R.T. 1802:2-5; 1802:24-25. Respondents' counsel, in his closing argument to the jury, described a preponderance of the evidence by stating: "If you believe that the scales of justice are just a little bit inclined to support the conclusion that [petitioner] acted with reckless disregard, then you must find that he did act with reckless disregard." R.T. 1784:26-1785:2.

After the jury had deliberated approximately 4½ hours, it asked to have the instructions concerning actual malice reread to it. R.T. 1813:19; 1814:14; 1814:24-27. In response,

the court reinstructed the jury on this issue, including the instruction that respondents' burden of proof as to actual malice was by a preponderance of the evidence. R.T. 1815:1-1818-1819:18.

The jury, by a vote of 9 to 3, returned a general verdict for respondent Field of $100,000 general and $100,000 punitive damages and, by the same vote, returned a general verdict for respondent Field Research Corporation of $50,000 general and $50,000 punitive damages. R.T. 1820:12-1824:5. Judgment was entered on these verdicts. C.T. 79:2-80:23.

Petitioner appealed on the basis of a number of errors detailed in his opening brief to the Court of Appeal. His principal contention on appeal was that the trial court committed federal constitutional error by failing to properly instruct the jury on the correct burden of proof standard on actual malice borne by the respondents as plaintiffs in a First Amendment libel case. Opinion, 3; Appendix A, 3.

The Court of Appeal agreed with petitioner that the trial court committed federal constitutional error by failing to instruct the jury on the constitutionally compelled burden of proof standard on actual malice borne by the respondents. Opinion, 7; Appendix A, 6. However, the court held that this error was "harmless" under *Chapman v. California*, 386 U.S. 18 (1967) because, in the Court of Appeal's view, the evidence of actual malice was so overwhelming that (i) a hypothetical jury (i.e. one properly instructed) would still have found for respondents and (ii) the trial court should have *directed* the actual jury to return a verdict against petitioner. Opinion, 7-10; Appendix A, 6-8. Accordingly, the Court of Appeal affirmed the judgment. Opinion, 14; Appendix A, 12.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeal is diametrically in conflict with decisions of this Court on (i) the decisive importance of the actual malice burden of proof standard in First Amendment cases, (ii) the presumption of harm flowing from constitutional error in First Amendment cases, (iii) the proper application of the federal "harmless error" rule, and (iv) the seriousness of an erroneous judgment for a plaintiff in a First Amendment libel case.

The constitutional protection of open, robust debate insured by the clear and convincing evidence standard was rendered a nullity by the Court of Appeal's decision that failure to apply this standard was harmless error not requiring reversal. No First Amendment libel case in this Court or below has ever held that the trial court's failure to follow the constitutional command requiring clear and convincing evidence of actual malice is "harmless error". As this Court has repeatedly made explicit, it is "error of constitutional magnitude" whenever, in a First Amendment libel action, the jury determines the actual malice issue by any standard other than the "clear and convincing evidence" burden of proof. *Greenbelt Coop. Pub. Assn. v. Bresler*, 398 U.S. 6, 10 (1970) (wherein this Court reversed and remanded the jury's general verdict without speculating on whether that verdict could be sustained by the evidence).

The federal harmless error rule set forth in *Chapman v. California*, 386 U.S. 18, 21 (1967) limits the reviewing court's proper inquiry simply to whether there is a reasonable possibility that the error complained of might have contributed to the verdict. *Chapman, supra*, p. 23. Moreover, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. 18, 24

(1967). Notwithstanding the Court of Appeal's view, inquiry regarding federal harmless error is neither a directed verdict test nor does it permit the reviewing court to engage in suppositions concerning what the jury might have done had it been properly instructed. The "overwhelming evidence" basis for the court's decision was specifically disapproved by this Court where federal constitutional rights are infringed. *Chapman, supra,* p. 23. *Chapman* limited proper inquiry to the determination of whether the constitutional error reasonably did in fact contribute to the actual verdict rendered by the erroneously instructed jury. *Chapman, supra,* p. 23. This Court emphasized in that decision its "intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party." *Chapman, supra,* p. 23.

The trial court's constitutional error did affect petitioner's substantial rights since, as properly measured by the federal harmless error standard, it deprived him of a fair jury trial. The erroneously applied actual malice burden of proof standard in this case was the prism through which all of the evidence bearing on the crucial issue of petitioner's state of mind was viewed by the actual jury in this case. This constitutional error cannot be segregated out. The constitutional error here concerns the basic trial mechanism by which all of the relevant evidence bearing on the state of mind issue was, in fact, assessed by the jury which found for respondents by the bare minimum of 9-3. The probability of infringement of petitioner's constitutional rights was further increased by the necessarily uncertain nature of the general verdict which was returned by the jury. As this Court recently stated in *Greenbelt Coop. Pub. Assn. v. Bresler,* 398 U.S. 6, 11 (1970):

> "The erroneous instructions to the jury would, therefore, alone be enough to require the reversal of the

judgment before us. For when 'it is impossible to know, in view of the general verdict returned' whether the jury imposed liability on a permissible or impermissible ground, 'the judgment must be reversed and the case remanded.' " [citations omitted]

The constitutional error here is particularly critical since, as the record discloses, the facts of this case bearing on petitioner's good faith belief in the truth of his statements were not uncontradicted. The probative facts and inferences therefrom as to state of mind bearing upon petitioner's sworn good faith belief present fact issues peculiarly within the jury's province and not matters upon which the reviewing court should substitute its judgment from a cold record. *Time, Inc. v. Hill*, 385 U.S. 374, 394 n.11 (1967) ("where either result finds reasonable support in the record it is for the jury, not for this Court, to determine whether there was knowing or reckless falsehood").

The appellate court's assumption of the jury function to affirm a judgment based on admittedly unconstitutional jury instructions against a defendant in a First Amendment libel action is especially serious. In libel actions, erroneous verdicts for the plaintiff must be viewed as most alarming because of the strong impetus toward self-censorship which the First Amendment cannot tolerate. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971). Even the most unpopular of figures cannot be deprived of the First Amendment protections of the clear and convincing evidence standard of proof for actual malice.[1] The vital considerations requiring imposition of the stricter standard of clear and convincing

1. The clear and convincing evidence burden of proof is not an ordinary negligence standard based on reasonable doubt or the mere tipping of the scales of justice; it requires clear and convincing proof of a high degree of awareness of probable falsity—"serious doubt." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

evidence of actual malice in First Amendment cases cannot be served when appellate tribunals are permitted to affirm judgments predicated upon admittedly improper instructions by speculating on what the jury would have concluded had they been properly instructed. The fundamental problem is that petitioner has yet to have the issue of his state of mind determined by a properly instructed jury reviewing all the evidence in the record. For example, in choosing to disbelieve petitioner, the Court of Appeal had none of the important demeanor evidence before it which the jury could rely on in determining his good faith belief. The fact that the jury in this case, by the bare required majority, could only decide in respondents' favor under a substantially less stringent standard is a clear indication that the evidence was in strong dispute on the question of petitioner's state of mind at the time he made the subject statements.

This Court has consistently refrained from speculating on what a jury might have done if properly instructed on the requisite burden of proof in First Amendment libel cases. Where the jury is required to review the testimony under an erroneous standard of burden of proof, the fact that an appellate court might properly apply the correct standard is no warrant for affirmance. *Time, Inc. v. Hill,* 385 U.S. 374, 394 (1967); *New York Times v. Sullivan,* 376 U.S. 254, 284 (1964) (where general verdict renders jury decision uncertain, judgment must be reversed and remanded). Where, as here, the federal constitutional error so permeates the trial court judgment that it cannot be segregated out, the decision of that court must at the least be reversed and remanded. *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 57 (1971) (affirming reversal of jury verdict on actual malice for failure to apply constitutional standard); *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 277 (1971) (reversing and remanding judgment be-

cause jury improperly guided on application of *Sullivan*); *Greenbelt Coop. Pub. Assn. v. Bresler*, 398 U.S. 6, 10 (1970) (reversing and remanding judgment on possibility error in instructions affected jury's general verdict).

The constitutional questions raised by the decision in this case are both grave and substantial. At stake are (i) the continued vitality of the constitutionally compelled clear and convincing evidence standard of proof in First Amendment libel cases; (ii) the oft-reiterated presumption of harm flowing from constitutional error in First Amendment cases; and (iii) the federal harmless error rule safeguarding litigants from constitutional errors that "affect substantial rights".

The interests at stake are more than those of the immediate parties to this litigation. As this Court has stated, it can hardly be doubted that the First Amendment has its fullest and most urgent application precisely to the conduct of campaigns for public office. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 276 (1971). The danger of self-censorship in future political campaigns, or whenever established and influential political forces are called into question, can only be increased if juries are no longer compelled to apply the standard of "clear and convincing evidence" in First Amendment libel actions. Petitioner, himself the target of vigorous expression, was a political newcomer calling into question the integrity of an established and influential political poll. R.T. 1339:10-20. However, it is not petitioner's *ipse dixit* which is important. What is important is his right, and the right of future participants in the political process, to have the complex of disputed fact elements bearing upon a defendant's state of mind determined by a jury under the proper constitutional standard in a First Amendment libel case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal.

Dated: June 8, 1973.

Respectfully submitted,

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(Appendices Follow)

Appendix A

In the Court of Appeal of the State of California
First Appellate District

Division One

Filed February 16, 1973

1 Civil 29816

(Sup. Ct. No. 564926)

Field Research Corporation,
Mervin D. Field,
Plaintiffs and Respondents,
vs.
William P. Patrick,
Defendant and Appellant.

Plaintiffs Field Research Corporation and Mervin D. Field commenced an action against defendant William P. Patrick for damages for libel. Judgment was thereafter entered, on jury verdicts, in favor of Field Research Corporation for $50,000 compensatory damages and $50,000 punitive damages, and in favor of Mervin D. Field for $100,000 compensatory damages and $100,000 punitive damages. Patrick has appealed from the judgment.

After review of the trial record and consideration of the applicable law we have concluded that the judgment must be affirmed, and for the reasons which we now state.

Field and Field Research Corporation owned and operated a public opinion poll, known as the California Poll. Patrick was a candidate for the Republican nomination for Governor of California, at the June 1966 primary election.

On February 15, 1966, the California Poll published a canvassing result indicating that Patrick was favored by but one percent of the state's Republican voters.

Thereafter, during the period February 19, through May 2, 1966, Patrick made many remarks about the California Poll, Field Research Corporation and Field. Among them he stated that the February 15, 1966 poll was corrupt, dishonest, and rigged, that another primary candidate, one Christopher, had bought the poll for $16,000, that he knew the person who paid the money either to Field or the Field Research Corporation, and that he had people who were "willing to testify to the fact that money exchanged hands, $16,000 to be exact." The statements were made to, and widely published by, the several news media throughout California.

These remarks of Patrick became the subject of the instant action against him.

At the trial it was either conceded, or established beyond any reasonable doubt, that the alleged defamatory statements were in fact made by Patrick, that they were defamatory per se, that they were widely published by the news media to which they were made, and that they were in their entirety, untrue. It was further conceded by the parties that Field and Field Research Corporation were "public figures," and that Patrick's questioned remarks were privileged, unless made with actual malice.

The principal issue was the question whether Patrick's otherwise privileged comment was made with *"actual malice."* Here the parties were in agreement that the applicable rule provided that a public figure was precluded from recovering damages for a defamatory remark about his public conduct, in the absence of proof that the statement was made with actual malice—that is, *with knowledge that it was false or with reckless disregard of whether it was*

false or not. (See Rosenbloom v. Metromedia (1971) 403 U.S. 29 [29 L.Ed.2d 296]; Patriot Co. v. Roy (1971) 401 U.S. 265 [28 L.Ed.2d 35]; Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6; Beckley Newspapers v. Hanks (1967) 389 U.S. 81; Curtis Publishing Co. v. Butts (1967) 388 U.S. 130; New York Times Co. v. Sullivan (1964) 376 U.S. 254.) On this subject the jury were correctly instructed, the court stating, "the term 'actual malice' means that the defendant either published statements knowing they were false or with reckless disregard of whether they were false or not."

We now proceed to our analysis of the several contentions of Patrick's appeal.

I. His principal assignment of error is stated in this manner: "The trial court erred in instructing the jury that plaintiffs only had to prove actual malice by a preponderance of the evidence, and by refusing to instruct that clear and convincing evidence was the standard."

The trial court instructed the jury that "plaintiffs have the burden of proving actual malice by a preponderance of the evidence." The contention that this was error bears closely on recent developments of the law of libel.

In 1963, the United States Supreme Court in *New York Times Co. v. Sullivan,* supra, 376 U.S. 254, 284-286, imposed upon itself the duty to determine whether evidence upon which a jury found actual malice, had "the *convincing clarity* which the [First Amendment] constitutional standard demands, . . ." (Emphasis added; pp. 285-286.)

The next related case of the high court was *Curtis Publishing Co. v. Butts,* supra, 388 U.S. 130, where it was contended the defendant had previously waived certain constitutional privileges. Holding otherwise, the court stated: "Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued [First

Amendment] freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling. . . ." (P. 145; emphasis added.)

In 1967 the court in *Beckley Newspapers v. Hanks*, supra, 389 U.S. 81, reversed a libel judgment, itself finding that the "*convincing clarity*" of proof of actual malice required by *New York Times Co. v. Sullivan*, supra, was lacking.

The foregoing decisions seem to have been widely understood as requiring courts, as distinguished from juries, not to allow a libel judgment except upon actual malice established by clear and convincing evidence. (See Dacey v. Florida Bar Inc. (1970) 427 F.2d 1292; Bon Air Hotel, Inc. v. Time, Inc. (1970) 426 F.2d 858, 866; Time, Inc. v. McLaney (1969) 406 F.2d 565, 572; United Medical Laboratories v. Columbia Broadcasting Sys. (1968) 404 F.2d 706, 712-713; Pauling v. Globe-Democrat Publishing Company (1966) 362 F.2d 188, 198; Cerrito v. Time, Inc. (1969) 302 F.Supp. 1071, 1073-1074; Bennett v. Transamerican Press (1969) 298 F.Supp. 1013; Pape v. Time, Inc. (1969) 294 F.Supp. 1087, 1088; but see Goldwater v. Ginzburg (1969) 414 F.2d 324, 341, where the *jury* were instructed that actual malice must be established with "convincing clarity.")

It was at this point that the case at bench was, in July 1970, tried.

Thereafter *Patriot Co. v. Roy*, supra, 401 U.S. 265, was decided. It suggested (pp. 273-276), at least where public officials or "public figures" were concerned, that something more than "'preponderance of the evidence'" jury instructions were required by the First Amendment in defamation cases.

But the latest case of the series, *Rosenbloom v. Metromedia*, supra, 403 U.S. 29, leaves no doubt that First Amendment standards require jury instructions that "actual malice" be established by "*clear and convincing evi-*

dence." A Pennsylvania statute had stated, in effect, that malice attended the publication of defamatory material, if done "unreasonably and without ordinary care" to determine its truth. Reversing a plaintiff's jury verdict and judgment the Supreme Court stated:

"[W]e ordinarily decide civil litigation by the preponderance of the evidence. Indeed, the judge instructed the jury to decide the present case by that standard. In the normal civil suit where this standard is employed, 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.' [Citations.] In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement—the three-quarter-million-dollar jury verdict in this case could rest on such an error—but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate. These dangers for freedom of speech and press led us to reject the reasonable-man standard of liability as 'simply inconsistent' with our national commitment under the First Amendment when sought to be applied to the conduct of a political campaign. [Citations.] The same considerations lead us to reject that standard here." (Pp. 50-51.)

"We thus hold that a libel action, as here, by a private individual against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an event of public or general concern may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not. . . ." (P. 52.)

Rosenbloom v. Metromedia, Inc., must be read as a constitutional command that juries in libel actions be instructed that proof of "actual malice" shall be by "clear and convincing evidence." The rule comports with reason, for who but the trier of fact should, at least initially, apply the rules upon which liability for defamation is predicated.

It follows that Patrick's instant contention of error is valid.

There remains for us, however, the question whether such error was harmless.

We advert now to the uncontradicted evidence of the record to determine whether it may be said, as a matter of law, that actual malice—proof that the defamatory matter was published by Patrick with knowledge that it was false or with reckless disregard of whether or not it was false—was established.

Patrick testified that his *sole* source of information concerning the February 15, 1966 California Poll was one Polakoff, a worker in his political campaign. Polakoff told him, on or before February 17, that he had "it from a very close friend" named Broome, that Broome's "girl friend working in the Field office" had stated that "the Christopher organization paid $16,000 on the poll, to have that poll make Christopher look good at this time." Patrick asked Polakoff if "he could get that information," and Polakoff replied, "I'm sure I can." Only once again did Patrick discuss the subject with Polakoff; it was three days or a week or two weeks later, but not later than March 3. At that time Polakoff said he was having difficulty getting Broome, who was "holding out," to deliver the information. Polakoff himself, Patrick testified, had no information "that was useful to us"; he had said he was having some difficulty "but he thought he could get it." Patrick never learned anything further about the poll from Polakoff, or from anyone. He, himself, knew Broome, but made no effort to get in

touch with him. And he never did, or even tried to, find out the name of Broome's girl friend.

As pointed out, Patrick's second and final talk with Polakoff about the matter was no later than March 3, 1966. At that time, by Patrick's own appraisal, Polakoff had no information "that was useful to" establish the truth of Patrick's charges about the poll. But, nevertheless, over the next two months Patrick continued, repetitiously, to assure the public by means of newspapers, radio and television, that the poll was bought by Christopher for $16,000, that he would produce actual evidence of this at the trial, that he had proof that the poll was rigged, that he knew the identity of the person who paid the money, and that he had "people who are willing to testify to the fact that money exchanged hands, $16,000 to be exact."

It has consistently been held that where the facts and circumstances under which a defamatory publication is made are not disputed, the question of privilege, i.e., the existence of actual malice is one of law. In such a case there is no factual issue for the jury's determination. (Dauphiny v. Buhne, 153 Cal. 757, 764; Carpenter v. Ashley, 148 Cal. 422, 425; Swaffield v. Universal Eesco Corp., 271 Cal.App. 2d 147, 163; Russell v. Geis, 251 Cal.App.2d 560, 567; Kramer v. Ferguson, 230 Cal.App.2d 237, 244; Freeman v. Mills, 97 Cal.App.2d 161, 166; Jones v. Express Pub Co., 87 Cal.App. 246, 256; Adams v. Cameron, 27 Cal.App. 625, 638.)

By uncontradicted evidence it was demonstrated at the trial that many of Patrick's published remarks, such as knowing who paid the money and that he had witnesses who were willing to testify that the money changed hands, were known by him to be false. And Patrick's own testimony established uncontrovertibly that he believed that he had received from Polakoff, his only informant, no information

"that was useful to us" in support of the continued charges of the California Poll's corruption. It necessarily follows that, *believing* himself without useful information concerning these defamatory statements, Patrick entertained doubts of their truthfulness. And as said in *St. Amant v. Thompson,* 390 U.S. 727, 731: "Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." This and the other uncontradicted evidence establishes, at least, and as a matter of law, a reckless disregard by Patrick of the truth or falsity of his statements and thus, actual malice. This being the posture of the case when it was submitted to the jury, the trial court should have instructed that actual malice had been established.

It thus becomes apparent that the trial court's "preponderance of the evidence" instructions constituted harmless error under California Constitution, article VI, section 13, and under the federal constitutional standards of *Chapman v. California,* 386 U.S. 18.

II. Another contention of Patrick is that: "The evidence presented by plaintiffs at trial fails to show with convincing clarity that the defendant published his statements with actual malice."

The argument here is that this court, from its own examination of the record, must find the evidence of actual malice not to be clear and convincing. We have read the record and we are unable to make such a finding.

III. Next it is urged that "The trial court's refusal to allow the jury to consider the report of Polakoff on the issue of actual malice was error requiring reversal."

During the course of Patrick's testimony concerning his information from Polakoff, which Patrick had described as a rumor, plaintiffs requested that their "instruction 35" be read. Without objection from Patrick the court read

the following instruction: "Now, evidence of rumor is not admissible in this case to prove the truth of what was rumored, or to prove absence of malice on the part of Mr. Patrick in repeating the rumor. This evidence has not been received for that purpose and can have no bearing on either the issue of truth or malice and you are to disregard this evidence for that purpose. It has been admitted in this case solely for the purpose of explaining Mr. Patrick's other testimony."

At the close of the trial, among others, these instructions were given: "A false statement is no less defamatory because it is the repetition of rumor or gossip. If you conclude that what Polakoff told the defendant Patrick was a rumor, then that evidence shall have no bearing on either the issue of truth or malice, and you are to disregard this evidence for that purpose. But if you find that the statement of Polakoff to defendant Patrick was not a rumor, then the evidence as to what Polakoff may have told the defendant with regard to the matter involved in the defamatory statements bears on the question of malice and may be considered by you on that question."

Patrick now urges that such instructions erroneously prevented Polakoff's information from being considered by the jury on the issue of actual malice.

We need not consider this contention for as we have pointed out, Polakoff's report to Patrick, whether considered as rumor or not so considered, with other uncontradicted evidence of the case as a matter of law established actual malice, and thus there was no jury question on that issue.

IV. It is contended that "In a First Amendment case, plaintiff has the burden of proving falsity."

The record indicates that during the trial, for some reason Patrick moved "to withdraw the affirmative defense of

truth" of his defamatory statements. The motion was granted. And the evidence produced by plaintiffs that the statements were false may properly be described as overwhelming; there was no contrary evidence.

Here again it must be said as a matter of law that Patrick's statements were false, and that the jury should have been so advised. Since there was no jury question on this point we need not resolve Patrick's contention that, contrary to the trial court's jury instructions, recent cases place the burden of proving falsity on the plaintiff of a libel action. The error, if any, was not prejudicial and was harmless under state and federal constitutional standards.

V. Another assignment of error follows: "The trial court erred in refusing to order plaintiffs to produce the [1042] completed questionnaires used by plaintiffs' interviewers on which the poll was based."

Almost two years before the trial, in response to interrogatories, plaintiffs advised Patrick that the completed questionnaires were in existence. No demand for their production or inspection was made until midway through the trial when Patrick asked for a "court order that they be produced."

We note no compliance whatever with Code of Civil Procedure section 2031 providing for production and inspection of documents on motion, upon 10 days' notice to all parties. Nor was any excuse for such noncompliance offered. And the trial court stated, "I don't think there is any basis established yet for me ordering him to do any such thing. So if there is at a future point in this trial, the court will then entertain your request or motion again." No further request for production of the papers was ever made.

We observe no abuse of discretion in the trial court's provisional order denying the motion to produce.

VI. Patrick's final contention is that the trial court failed to instruct the jury on damages in the manner required by *Rosenbloom v. Metromedia, Inc.*, supra, 403 U.S. 29.

He concedes that the jury as to both compensatory and punitive damages, were correctly instructed in accordance with California law as it existed, or at least appeared to exist, at the time of the trial. He argues that *Rosenbloom v. Metromedia, Inc.*, decided almost a year later, "changed the law and made it clear for the first time that damages in defamation actions are also circumscribed by the Constitution." Operating retroactively, he insists, this change requires reversal of the judgment under appeal.

Part of the argument relates to the need for clear and convincing evidence of actual malice in support of a damage award in a libel action. Here we are in agreement but as pointed out, clear and convincing evidence of such malice does appear in this case. The balance of the argument is drawn in part from the remarks of dissenting justices of *Rosenbloom v. Metromedia, Inc.* We are assured that a justice who did not participate in the decision "would undoubtedly agree with this," as would a participating justice (who did not in fact express such agreement). Thus, we are told, ". . . it is entirely possible, even likely, that a majority of the Supreme Court will hold that *any* award of punitive damages in a defamation case is unconstitutional. At the very least, however, a majority of the court agrees that any such award must meet stringent guidelines or it violates the First Amendment."

We are unpersuaded. With the exception we have discussed, our close study of *Rosenbloom v. Metromedia, Inc.*, fails to disclose the change in the law as suggested by Patrick.

But for the argued "change of law" brought about by *Rosenbloom v. Metromedia, Inc.*, no contention is made that the damage awards were excessive. And we note that Patrick's net worth was an issue at the trial, the evidence showing his admissions in 1966 that he was worth $7,000,000, and in December 1968, "Oh, conservatively $25 million."

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

WE CONCUR:

.....
Elkington, J.

.....
Molinari, P. J.

.....
Weinberger, J.*

*Assigned by the Chairman of the Judicial Council.

Appendix B

Court of Appeal of the State of California
in and for the
First Appellate District

Division One

No. 29816

Filed March 16, 1973

Field Research Corporation, et al.,
Plaintiffs and Respondents,

vs.

William P. Patrick,
Defendant and Appellant.

BY THE COURT:

The Petition for a Rehearing filed in the above-entitled cause is hereby denied.

Dated Mar 16 1973

Molinari, P.J. P.J.

Appendix C

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

Apr 12 1973

DEAR SIR: *I have this day filed Order* .....

HEARING DENIED

In re: 1 Civ. *No.* 29816

FIELD RESEARCH CORPORATION

vs.

PATRICK

Respectfully,

G. E. BISHEL
Clerk

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1659

WILLIAM P. PATRICK,
Petitioner,

vs.

FIELD RESEARCH CORPORATION,
MERVIN D. FIELD,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether an erroneous jury instruction by the trial court as to the degree of proof required of the element of "malice" in a defamation case is prejudicial as a matter of law without regard to the nature and extent of the evidence on that issue.

STATEMENT

Respondents have for many years been engaged in public opinion research. Their findings on issues of public interest in California are published in the news media under the name "The California Poll". The California Poll has always been financed by the news media. Prior to February 15, 1966, respondents conducted a public opinion survey to determine the preference of California voters with respect to the various candidates, including petitioner (hereafter sometimes "Patrick"), then engaged in the primary campaign for the gubernatorial nomination. On February 15, 1966, they released to the news media a California Poll report indicating that among Republican voters 1% favored Patrick's candidacy.

Patrick thereupon began a series of more than ten public statements (not including his allegations in his answer and amended answer herein that his statements were true), many of which were widely repeated in the news media, in which he repeatedly charged over a period of more than two months that respondents had accepted $16,000 from a candidate to "rig" The California Poll of February 15, 1966, that the poll was "dishonest" and "corrupt," that it "deliberately misrepresented" Patrick's standing with the voters, and that it was a part of a "conspiracy to mislead the public." Patrick also repeatedly stated that he welcomed a lawsuit by respondents, that he encouraged respondents to sue him, that if they did not sue him they admitted they were guilty, that he had proof that his charges were true, and that if taken to court he

was prepared to prove that his charges were true and was confident that he could do so. On two of these occasions he was specifically warned by reporters present that what he was saying was defamatory. He nevertheless continued to repeat his charges.

All of these statements were made in the presence of representatives of the news media and were widely republished by the media. The trial court instructed the jury that these statements were defamatory per se, and Patrick has taken no issue with that determination on appeal.

At the trial he made no effort to prove the truth of his statements, and he has taken no issue with the conclusion of the District Court of Appeal, based on evidence adduced by respondents (characterized by the court below as "overwhelming"), that the falsity of his statements "in their entirety" was established as a matter of law. All of this evidence is set forth in detail in respondents' brief to the Court of Appeal, pages 8-27.

Respondents conceded at the trial that they were public figures, and the trial court instructed the jury that respondents were required to prove "malice" in order to recover. The court's instructions to the jury defined the term "malice" in accordance with *New York Times v. Sullivan* (1964), 376 U.S. 254, as requiring respondents to prove that Patrick published his remarks knowing they were false or with reckless disregard for whether they were false or not, and specifically instructed the jury (based on *St. Amant v. Thompson* (1968), 390 U.S. 727):

> "There must be sufficient evidence to permit you, the jury, to conclude that the defendant in fact entertained serious doubts as to the truth of the statements which were published by him at the time they were published."

Petitioner takes no issue with any of the foregoing. Although he asserts that there are two questions presented by his petition, his sole claim appears to be that, since the trial court erred when it instructed the jury that malice, as correctly defined by the court, was required to be proved by a preponderance of the evidence rather than by "clear and convincing" evidence, such error requires reversal, no matter how conclusive the evidence that petitioner in fact entertained serious doubt as to the truth of the statements which were published by him at the time they were published. He thus contends that the Court of Appeal in turn erred when, after a careful review of the record, it found malice established as a matter of law, since, by petitioner's analysis, apparently no evidence could ever be sufficient to produce that result. Neither decision nor reason supports that contention. It has been advanced to the Court of Appeal and the Supreme Court of California without success. It is without merit.

ARGUMENT

Preliminarily, respondents respectfully disagree with the conclusion of the California Court of Appeal that there was any error in the trial court's instruction on burden of proof of malice. Respondents contend

that the "clear and convincing evidence" requirement relating to the issue of malice concerns the kind of facts required to be proved, rather than the requisite degree of proof, and that the trial court correctly instructed the jury on this issue. These contentions are set forth in full in Respondents' Brief to the Court of Appeal at pages 45 to 60. The trial court's instructions on this issue as well as all of its instructions defining malice are set forth in Appendix A to that Brief.

Proceeding on the premise, however, that the instruction on burden of proof of malice was in error, there is clearly no basis for granting a writ of certiorari here, because any such error was utterly harmless. In seeking a rehearing in the Court of Appeal and in subsequently seeking a hearing in the California Supreme Court, petitioner seemingly contended (as here) that the error was prejudicial as a matter of law, but he also asserted that the Court of Appeal had overlooked some of the evidence of his "good faith" belief in the truth of what he said, by reason of which the error in giving this instruction was prejudicial. Now, perhaps recognizing that there is no such evidence, his sole contention is that the error was prejudicial as a matter of law without regard to what the evidence was on this issue.

Petitioner asserts that the decision below is in conflict with decisions of this Court. There is no conflict; the cases upon which he relies do not support the contention he advances. Thus, in *Chapman v. California* (1966), 386 U.S. 18, it is expressly held that error

is harmless if there is no reasonable possibility that the error might have contributed to the verdict. Petitioner's reliance on *Time, Inc. v. Hill* (1967), 385 U.S. 374 (petn. p. 8) is also misplaced, since it indicates only that the question is for the jury where "either result finds reasonable support in the record." There is no such record here. In its more recent decision in *Brown v. U.S.* (1973), 93 S.Ct. 1565, 1570, this Court rejected the claim that constitutional error is always prejudicial and affirmed the judgment because of the "overwhelming" evidence which made the error harmless.

The Court of Appeal here clearly applied the standard of the *Chapman* case. It reviewed the evidence in detail and concluded that the uncontradicted evidence "established, at least, and as a matter of law," that petitioner published his statements with malice. Petitioner makes no effort to identify any evidence which the Court of Appeal overlooked or which indicates the slightest possibility that the error might have contributed to the verdict. He contents himself with the sweeping generalization that the error "did affect" his rights, as if this conclusion were established by mere assertion.

The evidence on this issue, construed most favorably to Patrick, is summarized in the opinion of the Court of Appeal; it is also summarized at pages 29 to 35 of Respondents' Brief to the District Court of Appeal. Upon that evidence there can be no reasonable possibility that the error affected the verdict. Patrick's own testimony shows beyond any possible doubt that

he not only spoke with reckless disregard for the truth but that he stated what he knew to be false, accompanied by declarations of intent to prove truth in court, an objective which he never intended to attempt, through witnesses he knew did not exist.

His sole purpose was to get his name in the news. As the California Supreme Court said on an earlier appeal in this case, "If the charges were true, it would certainly be news that the Field Poll had been 'bought'." *Field Research Corporation v. Superior Court* (1969), 71 C.2d 110 at 115. The testimony of his publicity advisor (Coultas: Resp. Br. pp. 33-34) as well as his attorney at the time (Belli: Resp. Br. p. 35) shows that he was interested only in attracting attention to himself with utter disregard for the truth of what he said.

Nor does petitioner's contention find support in any of the defamation cases which he cites. In *Monitor Patriot Co. v. Roy* (1971), 401 U.S. 265, plaintiff was a public figure campaigning for office. The action was against defendant newspaper and columnist for reporting that plaintiff had many years earlier been a "small-time bootlegger." The trial court instructed the jury that if this charged past misconduct was relevant to his fitness for public office, plaintiff was required to prove malice; if it was not relevant, malice was not required to be proved. The court left to the jury to decide whether the charge was relevant to his fitness for public office. The judgment for the plaintiff was reversed by this Court, which concluded that there was no evidence of malice; therefore, the jury

had apparently decided that the charge was not relevant to the plaintiff's fitness for public office. However, in the Court's view, past criminal misconduct is always relevant to fitness for public office, and therefore instructions allowing the jury to return a verdict for plaintiff without finding malice were prejudicially erroneous. Nothing in this decision supports petitioner's claim here.

Petitioner's contention is likewise unsupported by the decision in *Greenbelt Cooperative Publication Association, Inc. v. Bresler* (1970), 398 U.S. 6. In that case the court held that the trial court's instruction defining the term malice was in error (and also that the offending word "blackmail" was not defamatory under the circumstances presented). The trial court's instruction permitted a finding of constitutional malice from proof of hatred, spite or ill will, which in turn could be inferred from the language used in the allegedly defamatory articles. Since this was not a correct definition of the malice required in an action by a public figure under the standard established in *New York Times v. Sullivan* (1964), 376 U.S. 254, this instruction constituted error. The issue of degree of proof of malice was neither presented nor discussed.

In *Rosenbloom v. Metromedia, Inc.* (1971), 403 U.S. 29, the trial court's instructions to the jury did not require a finding of malice because plaintiff was neither a public figure nor a public official. This Court concluded that the failure to require a finding of malice was prejudicially erroneous, since the issue to

which the challenged statements related was a public issue. The Court further concluded, after an independent analysis of the record, that the evidence of malice in the record was not sufficient to present a jury question on that issue. The court reiterated the standard from the *St. Amant* decision that there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. In the case now before the Court the jury was expressly so instructed.

Nothing in any of these decisions supports petitioner's contention that, where the jury is correctly instructed as to the standard of malice, an erroneous instruction as to the required *degree* of proof of such malice dictates reversal as a matter of law without regard to the record. The evidence here cannot be read without immediately concluding beyond any possible doubt that petitioner made all of the defamatory statements with reckless disregard for their truth. It shows clearly and convincingly that he either knew they were false or entertained serious doubts as to whether they were true. His arrogant disregard for the truth was exemplified in his testimony at the end of the trial. At that point he had heard all of the evidence which he now concedes established the falsity of his statements as a matter of law, yet he once again declared under oath his "good faith" belief that his charges were true (Answer to Petition for Rehearing, pp. 6-7). Petitioner's only reference to the evidence in this case is his unsupported assertion that "the facts of this case bearing on petitioner's good

faith belief in the truth of his statements were not uncontradicted" (Petn. p. 8). Presumably this is the "contradiction" which petitioner has in mind.

CONCLUSION

The principle underlying *New York Times* and subsequent cases is that the First Amendment embodies a commitment to "robust debate" on public issues. Such a commitment affords no protection to a unilateral vendetta such as that carried on by Patrick here. The evidence shows that Patrick's long diatribe was conceived and carried out as a publicity campaign having nothing to do with robust debate. He showed himself beyond any possibility of doubt to be engaged in an assault on respondents solely for the purpose of keeping himself in the public eye. The whole fabric of his remarks was a vast hoax in which by conscious falsehood he sought to make himself appear a crusader for the public good. He repeatedly stated what he knew to be false and embellished these statements with declarations that he would prove them in court, an objective which he never intended even to attempt. The First Amendment affords no protection for such activity.

It has been recognized that there are cases in which the decision flows so inevitably from the facts that a consideration of claimed errors becomes virtually academic. 3 Witkin, *California Procedure* (2d ed.), 2280. Respondents believe this is such a case.

If the groundless declaration by petitioner of his belief in the truth of what has been demonstrated to be false could provide a basis for the reversal of such a case, then indeed the Fourteenth Amendment would have been discredited by "gossamer possibilities of prejudice." *Snyder v. Massachusetts* (1933), 291 U.S. 97, recently quoted at *Dutton v. Evans* (1970), 400 U.S. 71, 89-90.

The petition should be denied.

Dated, San Francisco, California,
July 5, 1973.

DAVID D. RING,
HAIZLIP, RING, O'DONNELL & MOORE,
Attorneys for Respondents.